

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|----------------------------------|---|----------------------|
| JAMES D. BOGGS |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| STATE OF KANSAS |) | Docket No. 1,023,507 |
| Respondent |) | |
| AND |) | |
| |) | |
| STATE SELF-INSURANCE FUND |) | |
| Insurance Carrier |) | |

ORDER

Claimant and Respondent appeal the October 8, 2008, Award of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded a 75 percent impairment to the right lower extremity for the injuries to his right knee on May 23, 2002. The ALJ also awarded claimant 88.34 weeks of temporary total disability compensation (TTD) for the knee injuries.

Claimant appeared by his attorney, Bruce Alan Brumley of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Larry G. Karns of Topeka, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, at oral argument to the Board, the parties stipulated that the number of weeks of TTD in contention is 71.99 weeks. That figure will be utilized by the Board when calculating this award. The Board heard oral argument on February 3, 2009.

ISSUES

1. What is the nature and extent of claimant's injuries? Respondent contends that claimant had a good result from the multiple knee surgeries performed after the May 23, 2002, automobile accident and

was left with a 37 percent impairment to the right lower extremity. Claimant argues that the result was poor and the 75 percent impairment given by the ALJ was justified.

2. Should the 71.99 weeks of TTD stipulated to by the parties be deducted from the weeks listed in K.S.A. 44-510d? Additionally, should the amount of TTD paid be included as part of the \$50,000.00 cap listed in K.S.A. 44-510f?

FINDINGS OF FACT

Claimant was employed as an equipment operator specialist when, on May 23, 2002, he was involved in a serious motor vehicle accident. Claimant suffered a serious injury to his right leg, leading to several surgeries on his right knee. Claimant underwent three arthroscopies and a high tibial osteotomy under the care of James McAtee, M.D. Claimant continued to have problems with the knee and ultimately underwent a full knee replacement with board certified orthopedic surgeon William W. Bohn, M.D. Claimant continued to have difficulties. When Dr. Bohn first examined claimant, he noted claimant's ongoing pain which was being managed by prescription narcotic medicine. Dr. Bohn also noted that claimant's knee pain worsened with work. He described claimant as having a short fuse due to the difficulty with coping with the pain claimant experienced by the end of the day.¹ The right total knee replacement occurred under the care of Dr. Bohn on March 14, 2006. Claimant initially showed good progress, and was referred for physical therapy. Claimant continued to complain of significant knee pain. In the May 11, 2006, report, Dr. Bohn's nurse, Janet Scalet, described the right knee as dysfunctional. Claimant continued with physical therapy. In the June 8, 2006 report authored by Dr. Bohn, claimant's progress was indicated as "excellent".² It was anticipated that claimant would return to work without restrictions. When claimant did return to work, in July 2006, he reported pain in the knee, especially toward the end of the day. His return to work originally prohibited crawling and stooping. By August 15, 2006, claimant was working without restrictions, but was using two Lorcet tablets in the morning for pain.

Claimant's pain continued for several months. However, in his report of December 12, 2006, Dr. Bohn described claimant's pain as "questionable".³ His ongoing recommendation was for continued pain management. By March 8, 2007,

¹ Bohn Depo., Ex 2.

² Bohn Depo., Ex. 2.

³ Bohn Depo., Ex. 2.

claimant began complaining of pain in his back, hips and other knee due to the double load problems associated with the right knee pain. Claimant was referred for a three-phase bone scan of the knee. The scan indicated increased activity in the medial and lateral femoral condyle consistent with movement of the prosthesis. This indicated a micro-loosening of the new knee. In his May 2, 2007, report, Dr. Bohn recommended claimant be followed every six months with x-rays.

In his August 21, 2007, report, Dr. Bohn discusses claimant being one month post right revision total knee arthroplasty. Dr. Bohn's deposition transcript contains no reports from this surgery, only follow-up reports. Claimant's post-surgery results are listed as excellent. The eight week report of September 18, 2007, describes claimant's results as "good", with an anticipated return to work on September 24, 2007. Dr. Bohn's final examination on November 13, 2007, indicates claimant is doing well, but continues to take two Lorcet, three times per day, while working. The outcome status is indicated as "excellent".⁴ Dr. Bohn's letter of January 10, 2008, rates claimant at 37 percent to the right lower extremity, with an excellent outcome from the knee replacement.⁵

At the regular hearing on February 28, 2008, claimant described ongoing pain in the knee which required he take two Hydrocodone, twice a day, while working. At the continuation of the regular hearing, held on September 2, 2008, claimant testified to taking two Hydrocodone, three times per day, for pain.

Claimant was referred by his attorney to Daniel D. Zimmerman, M.D., for an evaluation on February 9, 2007, and again on November 19, 2007. At the time of the February examination, claimant was rated at 75 percent to the right lower extremity, pursuant to the fourth edition of the *AMA Guides*.⁶ During the November examination, Dr. Zimmerman found claimant to have reached maximum medical improvement (MMI) and the rating remained the same. The rating was based on claimant having had a poor result from the knee replacement surgeries. This determination stemmed from claimant's ongoing pain problems in the knee. Dr. Zimmerman explained that, under the *AMA Guides*, table 66, page 3-88, pain is rated and points are assessed depending on the level of that pain. No pain results in a 50-point rating. Severe pain results in no points being awarded. Dr. Zimmerman awarded claimant no points due to claimant's ongoing pain complaints. Additional points are awarded for range of motion, stability, flexion/contracture measurements and alignment. The maximum number of points is 100, with 0 being the minimum. A patient receiving 85 to 100 points has a good result and

⁴ Bohn Depo., Ex. 2.

⁵ Bohn Depo., Ex. 3.

⁶ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

is rated at 37 percent to the lower extremity. 50 to 84 points is a fair result, with a corresponding rating of 50 percent to the lower extremity. Below 50 points indicates a poor result, with a 75 percent rating to the lower extremity. Because of claimant's poor result with the corresponding loss of points for pain, Dr. Zimmerman found claimant to have only 34 points under the *AMA Guides*.

Dr. Bohn, using the same rating system, found claimant to have a total of 92 points, with no points given for ongoing pain. Therefore, Dr. Bohn determined claimant had a good result from the surgery and rated claimant at 37 percent to the lower extremity. Dr. Bohn testified that claimant had little or no pain during most of the day, with intermittent pain towards the end of the day.

Claimant was referred by the ALJ to board certified disability evaluating physician Peter V. Bieri, M.D., for an evaluation on July 24, 2008. Dr. Bieri, in utilizing the same method of rating under the fourth edition of the *AMA Guides*,⁷ found claimant to have some pain, with a corresponding 55 points on the 100-point scale. Dr. Bieri only gave claimant 10 points due to ongoing pain, which he described as moderate on a continual basis.

The ALJ found claimant to have a poor result from the knee replacement surgeries and awarded claimant the 75 percent impairment as determined by Dr. Zimmerman. In calculating the award, the ALJ also deducted the weeks of TTD from the number of weeks contained in the schedule under K.S.A. 44-510d, and did not include the TTD amounts in the \$50,000.00 limit set forth in K.S.A. 44-510f.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁸

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁹

⁷ *AMA Guides* (4th ed.).

⁸ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

⁹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹⁰

The Board, in evaluating the opinions of the examining and treating physicians, finds that claimant did not have a good result from these surgeries. Claimant's testimony regarding the amount of pain he suffers daily, as well as the levels of pain medication that is required for claimant to complete a workday, is convincing. It is significant that claimant only needed Hydrocodone, two tablets, twice per day, in February 2008, but needed two tablets, three times per day, by September 2008. While Dr. Bohn found claimant to be almost pain free, claimant's testimony contradicts that finding. The rating assessed by Dr. Zimmerman most closely compares to the complaints described by claimant. Therefore, the 75 percent functional impairment to claimant's right lower extremity is affirmed.

Claimant argues that TTD should not be deducted when determining his permanent partial disability benefits. The Board disagrees. The schedule of K.S.A. 44-510d provides that a worker is entitled to no more than 200 weeks of permanent disability benefits for the loss of a leg. But that statute is silent regarding how to figure the TTD benefits into the computation. The Act is silent as well. Consequently, K.A.R. 51-7-8 was adopted and provides:

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries. (2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.(b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made. (1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows: (A) deduct the number of weeks of temporary total compensation from the schedule; (B) multiply the difference by the percent of loss or use to the member; and (C) multiply the result by the applicable weekly temporary total compensation rate. (2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows: (A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the

¹⁰ K.S.A. 44-510e(a).

number of weeks on the full schedule for that member; (B) deduct the temporary total compensation; and (C) multiply the remainder by the weekly temporary total compensation rate. (3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member. (c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot. (2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone. (3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole. (4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule. (5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger. (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)¹¹

The regulation calls for the weeks of TTD to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent disability benefits due the injured worker.

K.S.A. 44-573 states:

The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. The commissioner of insurance may adopt and promulgate such rules and regulations as the commissioner of insurance deems necessary for the purposes of administering the workers compensation fund and group-funded workers compensation pools. All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.¹²

¹¹ K.A.R. 51-7-8.

¹² K.S.A. 44-573.

The Director of Workers Compensation clearly has the power to adopt rules and regulations necessary for the administration of the Workers Compensation Act. Administrative regulations adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.

“Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law.” *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, Syl. ¶ 1, 673 P.2d 1126 (1983).¹³

Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.¹⁴

Consequently, claimant’s award of permanent partial disability benefits must be computed after reducing the maximum 200 weeks by the temporary total disability weeks.

K.S.A. 44-510f(a) states:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof;

(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof;

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.¹⁵

¹³ *State v. Pierce*, 246 Kan. 183, 189, 787 P.2d 1189 (1990).

¹⁴ *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 2, 763 P.2d 317 (1988).

¹⁵ K.S.A. 44-510f(a).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to allow for the deduction of the stipulated number of weeks of TTD, but in all other regards should be affirmed. Claimant suffered an accidental injury which arose out of and in the course of his employment with respondent, with a resulting 75 percent impairment to the right lower extremity. The stipulated 71.99 weeks of TTD will be deducted from the weeks allowed under the schedule contained in K.S.A. 44-510d. K.S.A. 44-510f(a)(4) does not include TTD in the discussion of the maximum amount of an award for functional impairment only. When a statute is plain and unambiguous, we must give effect to the legislator's intention as expressed.¹⁶

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated October 8, 2008, should be, and is hereby, modified with regard to the number of weeks of TTD paid claimant, but affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, State of Kansas, and its insurance carrier, the State Self-Insurance Fund, for an accidental injury which occurred on May 23, 2002, and based upon an average weekly wage of \$688.20, for 71.99 weeks of temporary total disability compensation at the rate of \$417 per week or \$30,019.83, followed by 96.01 weeks at the rate of \$417 per week or \$40,036.17, for a 75 percent permanent partial functional disability to the right lower extremity, making a total award of \$70,056.00.

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum less any amounts previously paid.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel

¹⁶ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.¹⁷

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Larry G. Karns, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

¹⁷ K.S.A. 44-536(b).